



# Immigration Reform

**As the Debate for Comprehensive Immigration Reform continues, US Businesses find little to celebrate in Legislative Proposals.**

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The enactment of comprehensive immigration reform, stated goals of both Presidents Bush and Obama, continues to be elusive. Border security, the legalization of approximately 11 million undocumented

foreigners in the United States, and the order in which these initiatives are to be achieved, are at the centre of the ongoing debate. Delay in addressing these issues has resulted in a proliferation of state and local laws to regulate immigration and increased enforcement of employer worksite compliance obligations. With the 112th Congress about to convene, there appears to be little for businesses to celebrate.

## BUSINESS FUNDING OF BORDER SECURITY

Securing the nation's border to stem the flow of undocumented immigrants has been a cornerstone of US immigration policy for many years. On 26th October 2006 President Bush signed into law the Secure Fence Act which provided for the construction of 700 additional miles of a chain link and barbed wire fence on the U.S.-Mexico border. The estimated cost to US taxpayers was \$6 billion. The Obama Administration has also been successful in finding bi-partisan support for increased border security, but taps into a new source of funding for such initiatives, namely, certain employers who hire H-1B and L-1 workers. Signed into law by President Obama on 13th August 2010 The Emergency Border Security Supplemental Appropriations Act of 2010 authorizes an additional \$600 million to enhance border protection and law enforcement activities including the hiring of 1,000 new border patrol agents, 250 Immigration and Customs Enforcement

agents and 250 Customs and Border Protection officers. To fund these expenses, however, the law immediately raised H-1B and L-1 filing fees, by \$2,000 and \$2,250 respectively, for U.S. employers with more than 50 employees and a US workforce comprised of more than 50% H-1B or L-1 nonimmigrant workers. Critics of the law, including many of India's technology companies with US operations argue that the law amounts to double taxation and is contrary to the spirit of the World Trade Organization and the General Agreement on Trade in Services.

## MORE PROPOSED RESTRICTIONS ON H-1B AND L-1 VISAS

Increased costs for the hiring of H-1B and L-1 workers are not the only concern. Most immigration legislative proposals of the 111th Congress placed additional restrictions on these visa categories.

On 15th December 2009, the Comprehensive Immigration Reform for America's Security and Prosperity (CIR ASAP) Act of 2009 was introduced into the US House of Representatives with a proposal requiring employers to engage in efforts to recruit US workers before an H-1B petition could be filed. Employers of L-1 workers would be subject to wage requirements and would be restricted in their ability to place both H-1B and L-1B specialized knowledge workers at secondary worksites. Furthermore, the H-1B and L-1 programmes would be subject to increased agency scrutiny and both Department of Labor (DOL) and Department of Homeland Security (DHS) would have greater authority to conduct investigations, even in cases where no formal complaint was received.

Similar restrictive provisions appeared in the US Senate's immigration proposals. The Comprehensive Immigration Reform Act of 2010 (CIR), introduced on 1st October 2010 by Senators Robert Menendez (D-NJ) and Patrick Leahy (D-VT), required employers of H-1B workers to post details of the position on a new Department of Labor jobs website, and generally prohibited employers with 50 or more employees from petitioning for additional H-1B workers if their workforce was comprised of more than 50% H-1B and L-1 workers. Additionally, the proposals prohibited the placement of H-1B workers at third-



party sites, unless the worker was primarily supervised and controlled by the petitioning employer. Under CIR, employers were required to offer L-1 employees insurance, retirement and savings plans on the same basis and following the same eligibility criteria as benefits offered to US workers. Additionally, CIR imposed new restrictions on "new office" L-1 petitions.

Potentially the most disruptive proposals for the employment of H-1B workers are found in the American Jobs and Closing Tax Loopholes Act Stet, specifically in immigration-related amendment known as the Employ America Act (EAA), as proposed in the US Senate. EAA required employers of H-1B workers to certify that they have not had a mass layoff under the Worker Adjustment and Restraining Notification (WARN) Act and that they do not intend to provide notice of a mass layoff. It also provided that if an employer issues a notice of a mass layoff, all existing visas approved in the prior twelve months would expire 60 days after the notice and affected foreign nationals would be required to leave the United States within the 60-day period.

### INCREASED WORKSITE ENFORCEMENT

While House and Senate immigration proposals of the 111th Congress called for more restrictions on the use of the H-1B and L-1 visa categories, the federal government has stepped up its enforcement of immigration worksite compliance obligations of all employers, particularly as they relate to an employer's obligation to verify an employee's identity and work eligibility on Form I-9 at the time of hire. During 2009 and 2010 there have been three distinct trends in the enforcement of immigration worksite compliance obligations by Immigration and Customs Enforcement (ICE): an increase in the number of Form I-9 audits, an enforcement strategy focused on employers, and the use of criminal statutes to prosecute employers and their representatives.

On 19th November 2009 ICE announced the issuance of Notices of Inspection (NOIs) to 1,000 employers across the country to compel the production of their Forms I-9 and to audit their hiring and business records. This number surpassed the delivery of NOIs to 652 businesses on 1st July 2009, which had exceeded the number of NOIs issued for all of fiscal year (FY) 2008. More recently on 17th September 2010 ICE announced that it was issuing more than 500 additional NOIs. In addition to the unprecedented number of NOIs issued, in November 2009 ICE also announced new guidelines for determining civil monetary penalties.

Where the Bush Administration focused its worksite enforcements efforts on raids that targeted undocumented workers, the Obama Administration's enforcement strategies are focused on employers, particularly those who knowingly hire illegal aliens. The most common

criminal charges are those relating to the bringing in and harbouring of aliens in reckless disregard of their unlawful status. Penalties for violating such criminal statutes include fines, probation, imprisonment and forfeiture of assets.

### STATE'S RIGHTS AND E-VERIFY

Delay in the implementation of comprehensive immigration reform has resulted in the proliferation of state laws that address immigration issues. Actions taken by the State of Arizona in particular have highlighted the disarray that exists in the regulation and enforcement of immigration laws, an area historically and constitutionally reserved to the federal government. Through the use of the Commerce Clause of the US Constitution, the regulation and enforcement of immigration matters fall within the purview of the federal government and the United States Supreme Court has historically stuck down state and local attempts to regulate immigration matters. However, as a result of a perceived failure of the federal government to stop unlawful immigration, on 23rd April 2010, Arizona enacted an immigration law providing police with broad powers to check the immigration status of any person they reasonably suspect to be in the United States without authorization. The law also criminalized unlawful presence of foreign nationals. Although the law was subsequently amended on 3rd May 2010 to restrict police action to checking status only when making a lawful stop, detention or arrest, the federal government sued to enjoin Arizona from implementing certain provisions of law and obtained a preliminary injunction from the US District Court. The constitutionality of the law is presently under review by the Ninth Circuit Court of Appeals.

In addition to Arizona, numerous other states have enacted worksite enforcement laws, particularly as they relate to participation in E-Verify, a federal government programme whereby employers may verify the work eligibility and identity of newly hired employees online against government data bases. These laws fall into three main categories: (a) those that require all employers in the state to participate in E-Verify; (b) those that require public or state employers to participate; and (c) those that require employers contracting with the state or political subdivisions within the state to participate in E-Verify. Challenges to such laws have been largely unsuccessful. However, the proliferation of state legislation in this area is not without growing concern and comprehensive immigration reform is likely to result in new federally mandated employment verification procedures for all employers. One set of proposals by Senate Democrats calls for the implementation of a new federally administered biometric employment verification system through the use of biometric social security cards.





## TRAVEL

In 2010 business travel to the United States became more streamlined albeit more expensive. In May 2010 Customs and Border Protection eliminated the need for visa waiver travellers to complete the green Form I-94 Arrival/Departure record. This followed the introduction in January 2009 of the online Electronic System for Travel Authorization (ESTA) through which visa waiver travellers apply for advance approval before travelling to the United States. ESTA requires travellers to complete all of the basic admissibility eligibility questions about prior arrests, communicable diseases and previous immigration denials that were previously requested on the Form I-94W. Although ESTA provides a green solution to immigration form completion by visa waiver applicants, it became a more expensive alternative on 8th September 2010 when use of ESTA became subject to a \$14 fee.

## SOME POSITIVE DEVELOPMENTS

In an effort to conclude on a more optimistic note, there were a few proposals in CIR and CIR ASAP that provided at least some positive immigration developments for employers. CIR included provisions that would permit H-1B, E, I, L-1, O and P non-immigrant visa holders to apply for visa renewals within the United States if the visa is valid or expired for less than one year. The proposal also granted foreign nationals who are no longer employed by their petitioning sponsor 60 days to depart the United States or apply for a change or extension of status. Both bills contained proposals to recapture unused immigrant visa numbers and eliminate per country limits for employment-based immigrants. The proposals also provided exemptions from the quota for certain foreign nationals educated in the United

States. Furthermore, F-1 students would be permitted to enter the United States with immigrant intent if they are bona fide students pursuing a full course of study in the sciences, technology, engineering or mathematics. It remains to be seen if these favourable developments are to be incorporated into comprehensive immigration proposals in the 112th Congress.

## CONCLUSION

When it finally arrives, Comprehensive Immigration Reform will undoubtedly bring some relief to undocumented aliens living in the United States, enhanced border security measures and more obligations on employers to ensure that employees that they hire are authorized to work in the United States. What remains to be seen is if the proposals will also bring about significant new restrictions on the use of the H-1B and L-1 visas. All of the above are likely to be influenced and shaped by US economic performance indicators, particularly as they relate to unemployment figures, at the time of Congressional debate.

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